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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS JENKINS THOMAS,

Defendant and Appellant.

C087376

(Super. Ct. No.  
STKCRFE20020007583)

Defendant Thomas Jenkins Thomas was convicted in 2004 of involuntary manslaughter, discharge of a firearm in a grossly negligent manner, and possession of a firearm by a felon. His sentence of 85 years to life includes two 5-year enhancements imposed pursuant to Penal Code section 667, subdivision (a).<sup>1</sup> We affirmed the conviction in July 2005. (*People v. Thomas* (July 12, 2005, C046357) [nonpub. opn.].)

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

In March 2018 defendant filed a petition for a recall of sentence pursuant to section 1170.126. The trial court denied the petition, concluding defendant is not eligible for relief because he used a firearm in the commission of the offenses. (See §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), & 1170.126, subd. (e)(2).) Defendant appeals.<sup>2</sup>

Counsel was appointed to represent defendant on appeal. Counsel initially filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). On December 12, 2018, counsel filed a supplemental brief seeking remand to allow the trial court to exercise its sentencing discretion and consider striking defendant's two 5-year enhancements pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, Ch. 1013, §§1-2) (Senate Bill 1393). Because counsel has filed a brief raising a substantive issue, we will not perform independent *Wende* review. (See *People v. Woodard* (1986) 184 Cal.App.3d 944, 945-947.)

Defendant contends the matter must be remanded for resentencing pursuant to section 1385, as amended by Senate Bill 1393, effective January 1, 2019, to allow the trial court to exercise its discretion whether to strike the 5-year enhancements imposed pursuant to section 667. We disagree.

Under the so-called “*Estrada* rule” (*In re Estrada* (1965) 63 Cal.2d 740), Senate Bill 1393 applies “to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 [became] effective on January 1, 2019.” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) A judgment becomes final when the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*Ibid.*) Defendant's judgment became final long before the enactment of Senate Bill 1393. Thus, in 2004, the trial court imposed defendant's two 5-year enhancements

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<sup>2</sup> An order denying a petition for a recall of sentence pursuant to section 1170.126 is an appealable order. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 597.)

pursuant to section 667. We affirmed defendant's conviction in 2005, the same year the California Supreme Court denied defendant's petition for review. We issued our remittitur in defendant's case on September 28, 2005. Defendant's time for petitioning the United States Supreme Court passed nearly 13 years before he filed his petition pursuant to section 1170.126. As defendant's judgment became final prior to the enactment of Senate Bill 1393, he is not entitled to relief.

#### DISPOSITION

The judgment (order) is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

ROBIE, J.